three *Baker* factors, it seems apparent to us that we could not determine [petitioners'] claims without passing judgment on the decision of the executive branch to participate in the alleged covert operations." *Ibid.* The court further noted that the Executive Branch's alleged participation "has already been the subject of a congressional investigation." *Ibid.*

Because the court of appeals affirmed the district court's decision to dismiss for lack of subject matter jurisdiction, it did not reach the question whether petitioner's complaint could also be dismissed on grounds of sovereign immunity.

5. The court of appeals denied a petition for panel rehearing and rehearing en banc, with then-Judge Roberts not participating. Pet. App. 62a-65a.

ARGUMENT

The unanimous decision of the court of appeals that this action is nonjusticiable is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly concluded that this case should be dismissed for lack of subject matter jurisdiction under the political question doctrine. In *Baker* v. *Carr*, this Court enumerated six factors that would render a case nonjusticiable under that doctrine. 369 U.S. at 217. The Court made clear that a case could properly be dismissed under the political question doctrine even if only *one* of the those factors was satisfied. See *ibid.* In this case, the court of appeals and the district court determined that at least *four* of the *Baker* factors were satisfied. See Pet. App. 8a-16a, 33a-45a. That analysis was plainly correct.

Petitioners' claims concern the alleged involvement of American officials in the death of the commander-in-chief of the Chilean army. Adjudicating those claims would necessarily require a court to evaluate the reasonableness of the President's broader decision, at the height of the Cold War, to take actions to prevent a Marxist-led government from taking power in Chile. See, *e.g.*, Pet. App. 10a-11a (noting that "officials[] of the executive branch * * * determined that it was in the best interest of the United States to take such steps as they deemed necessary to prevent the establishment of a government in a Western Hemisphere nation that * * * could lead to the establishment or spread of communism" and that "that decision was classically within the province of the political branches, not the courts"); *id.* at 37a (noting that "[t]he plaintiffs here * * * ask this Court to assess the reasonableness of the Executive Branch's decision to seek—perhaps through violent means—a change in the makeup of a foreign sovereign"). It is therefore clear that adjudication of petitioners' claims would implicate the constitutional commitment of the conduct of our Nation's foreign relations to the Executive and Legislative Branches; that there are no judicially discoverable or manageable standards for the adjudication of petitioners' claims; that the adjudication of petitioners' claims would necessarily involve a policy determination of a kind clearly for nonjudicial discretion; and that it would be impossible to adjudicate those claims without expressing a lack of respect for the Executive and Legislative Branches. *Baker*, 369 U.S. at 217.

2. Petitioners do not expressly contend that the decision of the court of appeals conflicts with the decision of any other court of appeals, or that the court of ap-

peals misapplied any of the factors articulated in *Baker*. Instead, they merely contend that lower courts "have displayed confusion over the proper application of the political question doctrine," and that the Court could use this case to "revisit the clarity and intelligibility of the *Baker* factors." Pet. 5. That argument should be rejected.

Petitioners do not identify any case involving the political question doctrine (other than this one) that they believe was incorrectly decided. Instead, the various cases cited by petitioner (Pet. 7-9) stand only for the unremarkable proposition that, in some cases, federal courts have concluded that the political question doctrine precludes judicial resolution of claims touching on foreign-policy and national-security concerns, and, in other cases, they have concluded that it does not. The differing results in those cases are wholly consistent with the principle that the political question doctrine requires a "case-by-case inquiry." *Baker*, 369 U.S. at 211; see generally 13A Charles A. Wright et al., *Federal Practice and Procedure* § 3534, at 454 (2d ed. 1984) (noting that "application of the political question tests of [*Baker*] is * * * highly individualized").

To the extent that petitioners suggest that the political question doctrine should be inapplicable whenever a plaintiff alleges a violation of individual rights, see, *e.g.*, Pet. 11 (asserting that "[t]he political question doctrine, if used to exempt review of violations of individual rights, places the Executive branch above the law"), they effectively challenge the validity of the political question doctrine itself. As the court of appeals observed, however, "[t]he principle that the courts lack jurisdiction over political decisions that are by their nature committed to the political branches to the exclusion

of the judiciary is as old as the fundamental principle of judicial review." Pet. App. 6a (internal quotation marks and citation omitted).

Indeed, the very case that petitioners cite (Pet. 13) for the proposition that "[t]his Court has a long history of protecting violations of individual rights," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), itself recognized that there is a class of cases involving "political act[s], belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive[,] and for any misconduct respecting which, the injured individual has no remedy," *id.* at 164. There is therefore no basis for the conclusion that the political question doctrine is inapplicable simply because a case involves an alleged violation of individual rights. See Pet. App. 13a (reasoning that "recasting foreign policy and national security questions in tort terms does not provide standards for making or reviewing foreign policy judgments"); *id.* at 38a (reasoning that petitioners' argument that they were "seek[ing] only a vindication of personal rights" "begs the question") (internal quotation marks omitted).

To be sure, as petitioners note (Pet. 8), some lower courts and judges have observed that the precise contours of the political question doctrine are "murky." See, *e.g.*, *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985). Whatever uncertainty there may be about the application of the political question doctrine in cases at the fringes, however, there is no uncertainty about its application here. As the district court observed, the claims at issue in this case "go to the very heart of the political question doctrine: foreign policy directives from the President himself." Pet. App.

39a. It is therefore unsurprising that all four judges who considered this case below determined that it presented a political question.[3]

3. Finally, this case would constitute a poor vehicle for consideration of any question concerning the scope of the political question doctrine for an additional reason. Dismissal of this action was also appropriate on the non-jurisdictional ground that petitioners had failed to state a valid claim because the United States was immune from suit. As the district court correctly determined, the United States was properly substituted as defendant on petitioners' claims against former National Security Advisor Kissinger under the Westfall Act (with the possible exception of one claim as to which Kissinger would have qualified immunity), and petitioners failed to identify a valid waiver of the United States' sovereign immunity. See Pet. App. 46a-58a. Accordingly, even if jurisdiction were not lacking under the political question doctrine, dismissal would still be required.

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[3] Petitioners suggest (Pet. 10) that lower courts sometimes decline to apply the political question doctrine and instead "use alternative grounds to determine justiciability." See, *e.g.*, *Doe* v. *Bush*, 323 F.3d 133, 137-141 (1st Cir. 2003) (dismissing claim on ripeness, rather than political question, grounds). As this Court has made clear, however, it is entirely proper for a federal court to elect to dispose of a case on one threshold jurisdictional ground rather than another. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999). Petitioners identify no case in which a lower court refused to evaluate the applicability of the political question doctrine and instead disposed of the case on a *non-jurisdictional* ground. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (holding that a federal court generally must decide a jurisdictional issue before a merits issue).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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